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In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD A. CURRY,
Petitioner

Versus

NASCO, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF IN OPPOSITION

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MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 3, 1992

Come now the movants, David L. Hoskins of the law firm of Scofield, Gerard, Veron, Hoskins & Soileau, and Jon D. Ross of the law firm of Neal & Harwell, formerly counsel for the respondent, NASCO, Inc. (NASCO), in this cause, and as officers of this Court move the Court pursuant to Sup. Ct. R. 37 for permission to file a brief amicus curiae in opposition to the petition for writ of certiorari filed in this cause by the petitioner, Richard A. Curry.

As grounds for this motion, the movants would respectfully show to the Court the following:

1. The movants formerly represented NASCO in this matter, and did so from the filing of suit until the present stage of these proceedings. NASCO has now advised the movants that NASCO does not wish to be further involved in these proceedings, and has directed the movants not to file a brief on behalf of NASCO in opposition to the pending petition for writ of certiorari.

2. In its judgment of January 23, 1989, imposing sanctions, including the six-month suspension from practicing before the Western District of Louisiana that is now challenged on this petition, the district court directed that "[o]n appeal, NASCO's counsel is to defend the entire judgment of this Court, including sanctions other than attorney's fees and expenses." *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 137 n.10 (W.D. La. 1989), Pet. App. at A-40 n.10. By Order dated February 16, 1989, the district court reiterated that directive. On June 25, 1990, the district court entered an Order in conjunction with the proceedings on remand again directing counsel for NASCO to act as counsel for the Court in conjunction with the sanctions proceedings until such time as

the sanction rendered against the petitioner has been resolved with finality. The movants have fulfilled the district court's directive to defend the sanction imposed against the petitioner through the remand proceedings in the district court and two appeals to the United States Court of Appeals for the Fifth Circuit, and are prepared to do so before this Court.

3. The movants believe that, for the reasons set forth in the amicus curiae brief attached hereto, the pending petition for writ of certiorari should be denied. The movants, because of their long involvement in these proceedings, are intimately familiar with the facts and the law applicable to this case, and are uniquely situated to properly brief the issues presented to this Court by the pending petition. In light of the stated intention of NASCO not to address the pending petition for certiorari, this Court will not have the benefit of any argument in opposition to the granting of certiorari unless this motion is granted.

4. Undersigned counsel has contacted Robert G. Pugh, counsel for the petitioner, Richard A. Curry, and has obtained written consent on behalf of the petitioner to file a brief amicus curiae in opposition to the pending petition. NASCO, however, has not consented.

ACCORDINGLY, and because this Court should have the benefit of a brief in opposition to the granting of certiorari in its determination whether to grant the petition, the movants respectfully request that this motion be

granted, and that they be permitted to file the attached brief amicus curiae.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case, in which the district court utilized its well-established inherent power to suspend from practicing before it an attorney who abused the court's processes, warrants review on certiorari to "clarify" the relationship between Rule 11 and the inherent power where (1) the sanctioned attorney failed to raise this issue in his original appeal and subsequently withdrew it at oral argument on his appeal after remand, and (2) the conduct for which the attorney was suspended does not fall wholly within the reach of Rule 11.

2. Whether this case, in which the sanctioned attorney was afforded prior notice of his substandard conduct, two full evidentiary hearings, and two appeals, warrants review on certiorari to "elucidate" the due process protections available to attorneys faced with the possibility of an inherent power sanction.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. The Nature of the Case 1

B. The Factual Context 2

C. The Proceedings Below 3

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 8

A. Rule 11 and the Inherent Power 9

1. Curry failed to preserve that question for review 9

2. The misconduct for which Curry was sanctioned does not fall wholly within the ambit of Rule 11 10

B. Due Process and the Inherent Power 12

1. Curry received fair notice of the conduct for which he was sanctioned 13

2. Curry had ample opportunity to be heard in his own defense 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **Page**

Brooks v. United States, 757 F.2d 734 (5th Cir. 1985) 10,18

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) 10

Chambers v. NASCO, Inc., 501 U.S. ____, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) 2,11

Eli Lilly and Co. v. Home Ins. Co., 794 F.2d 710 (D.C. Cir. 1986) 9

Ex parte Burr, 9 Wheat 529, 6 L. Ed. 152 (1824) 19

Ex parte Garland, 4 Wall 333, 18 L. Ed. 366 (1867) . . . 19

In re Snyder, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985) 11,15,19

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, ____ S. Ct. ____, 95 L. Ed. 479 (1951) 12

Northwestern Indiana Telephone Co., Inc. v. FCC, 872 F.2d 465 (D.C. Cir. 1989) 9

United States v. Camou, 184 U.S. 572, 22 S. Ct. 505, 46 L. Ed. 694 (1902) 18

TABLE OF AUTHORITIES (continued)

CASES **Page**

United States v. Fiallo-Jacome, 874 F.2d 1479 (11th Cir. 1989) 9

United States v. Richards, 646 F.2d 962 (5th Cir. 1981) 9

Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) 9

STATUTES

Fed. R. Civ. P. 11 8

Sup. Ct. R. 10.1 8

RULES

Louisiana Code of Professional Responsibility:

D.R. 1-102(A)(5) 11
D.R. 1-102(A)(6) 11
D.R. 7-102(A)(1) 11
D.R. 7-102(A)(2) 11
D.R. 7-102(A)(3) 11
D.R. 7-102(A)(5) 11
D.R. 10-101(A)(4) 11

COUNTERSTATEMENT OF THE CASE

Richard A. Curry petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. He seeks to overturn that court's affirmance of his six-month suspension from the rolls of the Western District of Louisiana. The respondent herein, NASCO, Inc. (NASCO), has no desire to involve itself in this proceeding. This brief in opposition is respectfully submitted by NASCO's former counsel as Amicus Curiae.

A. *The Nature of the Case*

The challenged sanction arose out of a diversity action to enforce a contract for the sale of a television station in Lake Charles, Louisiana. NASCO was the buyer. The sellers were Calcasieu Television and Radio, Inc. (CTR) and G. Russell Chambers, CTR's sole shareholder and director. When Chambers caused CTR to breach the contract, NASCO sued to enforce it.

Despite the absence of any colorable basis in fact or in law, Chambers, his codefendant, Mabel Christine Baker, and their attorneys, A.J. Gray III, Edwin A. McCabe, and Richard A. Curry, aggressively resisted NASCO's suit with a campaign of fraudulent, dilatory, and abusive conduct designed to thwart the rendering of meaningful relief by the district court. That campaign began with a deliberate act of fraud on the day Chambers received notice of the impending suit, and continued unabated for nearly three full years. NASCO prevailed, but only at great cost.

Ultimately, the district court imposed sanctions against the defendants and their attorneys, including the

six-month suspension at issue in this petition.[1] Those sanctions were affirmed on appeal. This Court granted certiorari with respect to the monetary sanction imposed against Chambers, and affirmed it. Curry now asks this Court to review *his* sanction on certiorari, and to overturn it.

B. *The Factual Context*

The context from which the challenged sanction arises is described in varying degrees of detail in four reported decisions: (1) the district court's original decision on the merits, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F. Supp. 1372 (W.D. La. 1985) [*NASCO I*]; (2) the district court's original sanctions opinion, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D 120 (W.D. La. 1989), Pet. App. A-1 [*NASCO II*]; (3) the Fifth Circuit's opinion on the initial appeals from the sanctions judgment, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), Pet. App. A-64 [*NASCO III*]; and (4) this Court's opinion affirming the sanctions judgment as to Chambers, *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), Pet. App. A-111 [*NASCO IV*].

Amicus adopts the factual findings set forth in those decisions as its counterstatement of the factual context of this case.

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[1] Monetary sanctions were imposed against Chambers. Baker was reprimanded. Gray was disbarred from the Western District and prohibited from applying for readmission for three years. McCabe was severely reprimanded and declared ineligible to practice in the Western District for five years. The sixth respondent, Gray's cocounsel, Gary L. Boland, was not sanctioned.

C. *The Proceedings Below*

The Fifth Circuit affirmed the district court's merits judgment in a *per curiam* ruling from the bench at oral argument. That court rejected the Public Records Doctrine arguments urged by the appellants as "singularly unconvincing" and "disingenuous," and held that their appeals were "manipulative," "completely frivolous," and "brought for the sole purpose of delay." *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished opinion affirming judgment on the merits). Accordingly, that court imposed sanctions against Chambers, CTR, and Baker pursuant to Fed. R. App. P. 38, and remanded the matter to the district court with instructions to fix the amount of the appellate sanctions, and to determine whether further sanctions should be imposed against the defendants and/or their counsel for the manner in which the case was conducted in the district court. *Id.*

On April 11, 1988, the district court held an evidentiary hearing on the sanctions issue. All parties, including Curry, submitted briefs and participated in that hearing to the extent they deemed appropriate.

In December 1988, the district court issued a Minute Entry noting that the range of sanctions under consideration included the possible suspension or disbarment of culpable counsel, and invited additional memoranda on that issue. All parties, except McCabe, submitted briefs.

On January 23, 1989, the district court rendered judgment imposing sanctions, including Curry's six-month suspension. *NASCO II*, 124 F.R.D. 120, Pet App. A-1.

Amicus takes exception to Curry's assertion that

"[t]he sanctioned activity consisted only of pleadings filed by Curry. . . ." Petition, p.3. That is simply not the case. Curry was sanctioned for his participation in "an illegal and fraudulent scheme and conspiracy . . . designed to place the operating properties of CTR beyond the reach and jurisdiction of [the district] Court through the medium of the Louisiana Public Records Doctrine and to deprive NASCO of its rights to specific performance. . . ," *NASCO II,* 124 F.R.D. at 125, Pet. App. at A-11, and in a subsequent "campaign of harassment, oppression, and delay," 124 F.R.D. at 144, Pet. App. at A-58, which the district court called "as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce," 124 F.R.D. at 142, Pet. App. at A-53.

The district court found that both Curry and his client, Baker, had played their roles in this "modern counterpart" of "trial by ordeal." *Id.*

Baker, "in all her acts, was under the complete control of Chambers." *NASCO I,* 623 F. Supp. at 1380. She "exhibited no discretion of her own," she showed "no fiduciary responsibility in her acts as trustee," she simply performed "any act or acts directed by Chambers without question and without consideration of why." *Id.* at 1381. She was "indispensable to the success of the conspiracy and the Public Records Doctrine defense in particular. She was the unfailing tool of [Chambers] and performed his every request without inquiry or question." *NASCO II,* 124 F.R.D. at 132-33, Pet. App. at A-29.

Curry, too, "was vital to the fraudulent Public Records Doctrine defense, and valuable to the harassment tactics of Gray and Chambers." 124 F.R.D. at 133, Pet. App. at A-30. He became "intimately familiar with [the initial fraud upon the court] through instruction, the record

and depositions," yet nevertheless "brazenly and deliberately urged upon [the] Court as uncontroverted fact, the attempted simulated and fraudulent sale to the Trustee Baker which [he] knew was fraudulent and was attempted for the sole purpose of depriving NASCO of its rights to specific performance." 124 F.R.D. at 128, Pet. App. at A-17. Hired by Gray "to assist and defend the Public Records Doctrine defense," 124 F.R.D. at 133, Pet. App. at A-29-30, Curry's "sole responsibility was to assure that [Baker] remained the unfailing tool of her brother." *Id.*, Pet. App. at A-30.

It was for his role in embracing that fraudulent defense and in participating in the campaign of harassment and oppression that Curry was suspended.

Following the rendition of judgment, Curry moved for reconsideration by the active judges of the Western District sitting *en banc.* When that request was denied, Curry appealed.

The Fifth Circuit affirmed. *NASCO III,* 894 F.2d 696, Pet. App. A-64. The court rejected Curry's due process arguments, concluding that he "had adequate notice of the charges and [was] allowed to present a defense to each one of them at the hearing." 894 F.2d at 707, Pet. App. at A-87. The court further concluded that the sanction was supported by express findings of bad faith and improper motivation amply supported by "clear and convincing evidence." 894 F.2d at 708, Pet. App. at A-89. "There is," the court said, "no dispute that the appellants [including Curry] did everything the district court said they did." *Id.*

On Curry's petition for panel rehearing, however, the Fifth Circuit remanded the matter for reconsideration. Noting Curry's protestations that his conduct was not

sanctionable, that he did no more than sign a minimal number of pleadings, and that he did not have an adequate opportunity to defend himself at the initial hearing, the Fifth Circuit instructed the district court on remand to "allow Curry to offer any relevant argument and evidence he may have," and to then "reinstate, supplement, or change its present findings and any ordered sanctions as it finds appropriate." Pet. App. at A-93. In so doing, the appellate court found no error of fact or law, found no abuse of discretion, and did not reverse or vacate the original judgment. It merely gave Curry a second bite at the evidentiary apple: "We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution." *Id.*

The district court then held an evidentiary hearing on July 6, 1990. At that hearing, the court permitted Curry to adduce such evidence as he saw fit. That evidence, however, was neither "uncontradicted" nor "uncontested," as he would suggest. Petition, p.6. To the contrary, Curry's evidence did not differ in substance from the evidence he adduced at the original hearing, and it was very much contradicted by the record, by the conduct of the defendants and their counsel throughout the course of the litigation, and by the logically inevitable inferences to be drawn therefrom.

On August 18, 1990, the district court reinstated its original findings and conclusions, and confirmed the sanction originally imposed, noting that it had "considered the arguments and evidence produced by Curry," but had found "nothing in the documentary evidence or in the testimony of witnesses Curry and Fornias or in the closing argument at the July 6, 1990 hearing which would have

even a slight effect" on its original findings. Pet. App. at A-100.

After a second attempt to secure *en banc* review or reconsideration by the active judges of the Western District, Curry again appealed.

Again, the Fifth Circuit affirmed. Pet. App. A-164. The appellate court concluded that the district court did not misinterpret its instructions on remand, Pet. App. at A-169-70, and rejected the reiteration of Curry's argument that his sanction was unsupported by evidence, Pet. App. at A-170-71. Declining to review and reevaluate the prior panel's holding that the district court's original findings were supported by clear and convincing evidence, and noting the limited nature of the remand, the appellate court found no abuse of discretion, and no error, in the district court's reinstatement of the sanction. Pet. App. at A-171. Finally, the appellate court rejected Curry's contention that the district court's reference to the Louisiana Rules of Professional Conduct was improper, erroneous, or violative of due process. Pet. App. at A-171 n.4.

Curry now seeks certiorari in an attempt to overturn the sanction imposed against him.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied.

This case presents no necessity for "clarification" of the relationship between Rule 11 and the inherent power. Curry failed to raise this issue in his original brief on appeal from the initial sanctions judgment. He withdrew it at oral argument on his appeal after remand. He has thus failed to preserve it for review. Beyond that, his argument that such

a clarification is necessary is based on a fundamental misapprehension of the proceedings below. He was not sanctioned for a mere violation of the certification requirements of Rule 11. He was sanctioned for knowingly embracing and participating in an abusive defense strategy predicated in fraud and designed to thwart the judicial resolution of NASCO's claims.

This case presents no occasion for "elucidation" of the due process protections available to an attorney facing the possibility of inherent power sanctions. In truth, Curry seeks no such "elucidation." He argues only that *he* did not receive the process due him at the hands of the lower courts: Fair notice, and an opportunity to be heard. That argument is predicated upon a mischaracterization of the proceedings below. Curry received due process. He had fair notice of the substandard conduct for which he was ultimately sanctioned, and he had two full evidentiary hearings and two appeals at which to present his defense. Due process requires no more.

REASONS FOR DENYING THE WRIT

This case presents no "special and important reasons" warranting review on writ of certiorari. Sup. Ct. R. 10.1.

Curry argues that this Court should grant certiorari (1) in order to "clarify" the relationship between the inherent power and Fed. R. Civ. P. 11, and (2) in order to "elucidate" the due process protections available to attorneys facing the possibility of an inherent power sanction.

Neither of those questions should be decided by this Court. The first was not preserved for review, and in any

event is not presented by this case. The second is based on a mischaracterization of the proceedings below, and amounts to little more than a complaint of evidentiary errors by the lower courts.

A. *Rule 11 and the Inherent Power*

Curry first suggests that certiorari should be granted because this case "squarely presents" a question pretermitted both by the Fifth Circuit in affirming the original sanctions judgment, and by this Court in affirming that judgment as to Chambers: Namely, whether a federal district court may invoke its inherent power to sanction conduct that falls wholly within the ambit of Rule 11.

But that question is not "squarely presented" by this case.

1. *Curry failed to preserve that question for review.*

To begin with, Curry has failed to preserve that question for review.

He did not raise it in his original brief on appeal from the district court's sanctions judgment.[2] He *could* have done so, for that argument in no way derived from the proceedings on remand. His failure to do so foreclosed his raising it on the appeal after remand. *E.g., United States v. Fiallo-Jacome,* 874 F.2d 1479, 1481-82 (11th Cir. 1989); *Northwestern Indiana Telephone Co., Inc. v. FCC,* 872 F.2d 465, 470 (D.C. Cir. 1989); *Walnut Properties, Inc. v. City of Whittier,* 861 F.2d 1102, 1106 (9th Cir. 1988); *Eli Lilly and*

[2] Curry first raised that issue in his petition for rehearing on the original appeal—even then too late. *United States v. Richards,* 646 F.2d 962, 963 (5th Cir. 1981).

Co. v. Home Ins. Co., 794 F.2d 710, 716-17 (D.C. Cir. 1986); *Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985).

Beyond that, Curry expressly withdrew and waived that issue at oral argument on his appeal after remand.[3] Pet. App. at A-168 n.2. As a result, it was not orally argued by either side, and was not decided by the lower appellate court.

Having not been raised and considered in the appellate court below, that issue should not be considered by this Court on certiorari. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, 109 S. Ct. 2909, ____, 106 L. Ed. 2d 219, 239 (1989).

2. *The misconduct for which Curry was sanctioned does not fall wholly within the ambit of Rule 11.*

Curry's suggestion that this case necessitates a clarification of the relationship between Rule 11 and the inherent power is based on a fundamental misapprehension of the proceedings below: That he was sanctioned for misconduct falling wholly within the reach of Rule 11.

He was not.

Curry was not sanctioned for merely failing to conduct the reasonable inquiry required by Rule 11, or for some other violation of the Rule's certification requirement. He was sanctioned for knowingly embracing and

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[3] Curry suggests that the Fifth Circuit "overstated" his concession in withdrawing this issue at oral argument below. Petition, pp. 14-15. That is simply incorrect. Curry did exactly what the Fifth Circuit says he did. He withdrew his argument that the district court was required to utilize Rule 11, and not the inherent power, to sanction Curry, and that issue was not addressed further by either side.

participating in a systematically abusive defense strategy predicated in fraud and designed to thwart the *judicial* resolution of NASCO's claims. *NASCO II*, 124 F.R.D. at 125, Pet. App. at A-11.

That conduct was "contrary to professional standards," and "inimical to the administration of justice." *In re Snyder*, 472 U.S. 634, 635, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 513 (1985). It flouted those duties that lie at the very core of the privilege of practicing law—the duty of integrity and honest dealing with the court, the duty to litigate in good faith, the duty to yield to the orderly processes of justice. *See* Louisiana State Bar Association Code of Professional Responsibility, D.R. 10-101(A)(4), D.R. 7-102(A)(3), (A)(5), (B); *id.*, D.R. 1-102(A)(5), D.R. 7-102(A)(1), (A)(2); *id.*, 1-102(A)(5), (A)(6).

That at some points along the continuum of his involvement his conduct may have also violated Rule 11's certification requirements can in no way diminish the inherent power of the court which admitted him to suspend him from practicing before it. *NASCO IV*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 47-49, Pet. App. at A-129-32. The district court, in its informed discretion, expressly concluded that Rule 11 was not up to the task at hand. *NASCO II*, 124 F.R.D. at 138-39, Pet. App. at A-42-44. Like the misconduct of Chambers, "much of the bad-faith conduct [by Curry] . . . was beyond the reach of the rules"; the "course of [that] conduct . . . evidenced bad faith and an attempt to perpetrate a fraud on the court"; and the conduct arguably sanctionable under Rule 11 was "intertwined with conduct only the inherent power could address." *NASCO IV*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 49, Pet. App. at A-131.

In sum, Curry's misconduct at most intersects the

perimeter of Rule 11 tangentially. It certainly does not fall wholly within the reach of the Rule, and most certainly does not present, squarely or otherwise, the question Curry would urge this Court to resolve.

B. *Due Process and the Inherent Power*

Curry next suggests that certiorari should be granted because it is necessary for the Court to "elucidate" the due process protections available to litigants and lawyers who face the possibility of inherent power sanctions.

But this case presents no "special and important reasons" for undertaking such an "elucidation"—and Curry offers none. Indeed, the only "elucidation" Curry urges is that due process requires fair notice and an opportunity to be heard before the sanction of suspension can be imposed. Hardly a novel proposition.

In truth, Curry does not ask this Court to "elucidate" anything. He asks only that the Court determine whether *he* received the process due him at the hands of the courts below.

That question—a matter of interest only to Curry—is not the stuff of certiorari. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502, ____ S. Ct. ____, 95 L. Ed. 479, 482 (1951) (certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is real and embarrassing conflict of opinion and authority between circuit courts of appeal).

Be that as it may, it is clear that Curry was afforded all the process due him in these proceedings.

1. *Curry received fair notice of the conduct for which he was sanctioned.*

Curry complains he did not receive fair notice of the contract for which he was ultimately sanctioned. That is simply not true.

Curry was served with a fourteen page sanctions motion, supported by a thirty-six page memorandum of authorities. Some seven pages of the motion, and some fifteen pages of the memorandum, were devoted to setting forth the factual basis for the sanctions sought against the respondents, including Curry. Curry was served with a sixteen page memorandum in opposition to his motion to strike the claims for sanctions against him. Seven pages of that opposition were devoted to detailing his misconduct. Curry was served with the district court's Minute Entry of December 12, 1988, setting forth the specific legal basis for the sanctions under consideration, notifying all parties that the court was considering disciplinary sanctions (including disbarment) against counsel, and soliciting additional memoranda on that issue. The sanctionable conduct occurred in the very litigation in which sanctions were sought, and the proceedings were based in large measure upon the existing record. Curry had full knowledge of that record. *NASCO II,* 124 F.R.D. at 141 n.11, Pet. App. at A-49 n.11. The district court issued a twenty-five page published opinion setting forth the factual and legal bases for the sanctions imposed—including the sanction against Curry. On appeal, Curry was treated to yet another, albeit more truncated, recitation of the legal and factual bases for the sanction imposed. That was notice.

Curry took that cumulative notice with him to the hearing on remand in the district court. And, as the district court observed, *that* hearing, preceded by *that* notice, must at the very least have "laid to rest the issue of due process." Pet. App. at A-97. Certainly, it must lay to rest

Curry's suggestion that "[n]o Court has afforded [him] a written statement of how the specific acts by Curry . . . was [*sic*] sanctionable or merited suspension from practice." Petition, p.24.

Curry would nevertheless suggest that the district court's reference to violations of Louisiana's Rules of Professional Conduct—without prior notice that ethical violations were at issue—was itself a violation of due process.

That suggestion is frivolous.

Courts suspending attorneys have generally done so in response to conduct that is "contrary to professional standards" or "inimical to the administration of justice," as described in the "case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *In re Snyder,* 472 U.S. 634, 645, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 513 (1985). The rules cited by the district court do embody "the lore of the profession" insofar as acceptable professional conduct is concerned, and do reflect the standards of professional conduct that were applicable at the time of Curry's representation of Baker.

Simply put, Curry's conduct fell far short of those accepted standards of conduct which embody the dual obligations to his client and to the judicial system that are inherent in his role as an officer of the court. *See In re Snyder, supra,* 472 U.S. at 644-45, 105 S. Ct. at ____, 86 L. Ed. 2d at 512-13. In citing the Rules of Professional Conduct, the district court did nothing more than point that out.

There is nothing talismanic in that citation. It was not the citation to those rules that formed the basis for the sanction imposed against Curry. It was his *conduct*—

conduct that was professionally substandard, and inimical to the administration of justice, by any measure.

In sum, given the remand in fact granted by the Fifth Circuit, Curry cannot now be heard to complain that he had inadequate notice of either his conduct or the potential sanctions that he faced. Certainly, he cannot suggest he had no notice that this conduct was substandard—particularly in light of the district court's extremely blunt language in its original sanctions opinion. *E.g.*, *NASCO II*, 124 F.R.D. at 143, Pet. App. at A-54 ("The attorneys who engineered this mockery are a disgrace to the profession.").

Curry had notice. He knew suspension was at stake. He knew what conduct was at issue. He knew that conduct had been found substandard by the district court. And he had ample opportunity to utilize that knowledge in preparation for two full evidentiary hearings.

2. *Curry had ample opportunity to be heard in his own defense.*

Curry complains that he did not have an adequate opportunity to be heard, either in the district court or in the appellate court below.

This amazing assertion comes after two full evidentiary hearings in the district court, and two appeals.

Curry contends that the remand hearing was defective because the district court mistakenly believed the sanction was already final and therefore did not really consider the evidence adduced. The appeal after remand was defective, he says, because the appellate court improperly declined to look behind the prior panel's affirmance of the district court's original factual findings, and failed to find

an abuse of discretion in the face of the district court's "erroneous view of the law" and "clearly erroneous assessment of the evidence."

Curry received a full evidentiary hearing in the district court on NASCO's initial sanctions motion. Following that hearing, the district court made detailed findings of fact as to Curry's misconduct, and on that basis imposed the sanction here challenged. The district court imposed that sanction "only after serious consideration based on unimpeachable and weighty evidence and a definite conviction that [the sanction was] necessary and appropriate under the circumstances in which the sanctioned acts were performed." *NASCO II*, 124 F.R.D. at 142, Pet. App. at A-52. The district court's factual findings were affirmed by the lower appellate court on the basis of "clear and convincing evidence." *NASCO III*, 894 F.2d at 708, Pet. App. at A-89.

Any question of the adequacy of that initial hearing and appeal for due process purposes is doubtless mooted by the appellate court's subsequent remand for reconsideration after a second evidentiary hearing.

In its remand, the appellate court directed the district court to "allow Curry to offer any relevant argument and evidence he may have," and thereafter to "reinstate, supplement or change" the original findings and sanction "as it finds appropriate." Pet. App. at A-93. "We do not hold," the appellate court was at pains to stress, "that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution." *Id.*

On remand, the district court did exactly what it was instructed to do. It scheduled a hearing. It accepted briefs from Curry urging that the sanction be vacated. It admitted, without limitation, all the evidence Curry offered. It permitted Curry's counsel to argue orally that the sanction should be vacated. It then took the matter under advisement, "considered the arguments and evidence" adduced by Curry, reconsidered its findings and the sanction imposed, and decided to let both stand. Pet. App. at A-100.

The district court did not, as Curry suggests, refuse to consider the evidence he adduced. It simply ruled against him. The evidence he adduced on remand did not differ significantly in substance from the evidence he offered at the original sanctions hearing. For the most part, it consisted of self-serving testimony and affidavits from the very coconspirators whose bad faith conduct had provoked sanctions in the first place. Those witnesses were no more credible, and their evidence was no more persuasive, on remand than at the original hearing. And the district court gave that evidence precisely the weight it deserved.

The district court's remarks about the "finality" of the sanction at the beginning of the remand hearing were nothing more than an absolutely accurate statement that the appellate court had found no error of law or fact, and had not reversed or vacated the original sanctions judgment—it had merely given Curry a second "opportunity to dispel" the district court's perception of his role in the bad faith defense of the underlying lawsuit. Pet. App. at A-93. Indeed, the original sanction, and the findings on which it was based, were expressly affirmed. The district court did no more than point that out, noting that the issue was whether, in light of the evidence adduced on remand, Curry's conduct warranted a six-month suspension from practice—and *not* the validity of the sanction or the

propriety of the court's initial use of its inherent power. A point which Curry's counsel readily conceded:

> MR. PUGH: Yes, Your Honor, I am aware of the fact. Of course, you did [impose] the sanctions and that they were affirmed by the Appellate Court. What we would like to do with the Court's permission is review what Mr. Curry did in the hopes that the Court might reconsider what it did and if possible recall the sanctions as against Mr. Curry.

Transcript of Remand Hearing, p.5.

On appeal, the Fifth Circuit reviewed the evidence adduced on remand and rejected Curry's argument that "the record does not support the . . . findings made in the . . . original sanctions opinion." Pet. App. at A-170. Noting the prior panel's conclusion that those findings were supported by clear and convincing evidence, and the limited nature of the remand, the appellate court declined "to review or re-evaluate" the prior panel's opinion, and found no abuse of discretion by the district court based on its review of the remand record. Pet. App. at A-171.

The appellate court was correct in that action. *See, e.g., Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985) (second appeal generally brings up for revision nothing but proceedings subsequent to mandate following prior appeal); *compare United States v. Camou*, 184 U.S. 572, 574, 22 S. Ct. 505, 506, 46 L. Ed. 694, 695-96 (1902) (second writ of error brings up for revision only proceedings subsequent to initial mandate).

In sum, Curry had a fair hearing. He had two fair hearings. And two fair appeals.

His contentions that he did not receive due process are meritless.

CONCLUSION

This case does not warrant review on certiorari.

The district court's inherent power to regulate and control attorney conduct, and to suspend an attorney for deliberate abuses of the judicial process derives from the attorney's role as an officer of the court which granted him admission. That power is well established, and is of ancient origin. *In re Snyder,* 472 U.S. 634, 643, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 512 (1985); *see Ex parte Garland,* 4 Wall 333, 378-79, 18 L. Ed. 366, 370 (1867); *Ex parte Burr,* 9 Wheat 529, 531, 6 L. Ed. 152 (1824).

That power was properly exercised in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Hoskins, a member of the Bar of this Court, hereby certify that I received a copy of the Petition For Writ of Certiorari on December 13, 1991, and that three copies of the Amicus brief in opposition to the petition for writ certiorari were mailed, first class postage prepaid, to Mr. Michael H. Rubin, Rubin, Curry, Colvin & Joseph, Ninth Floor, One American Place, Baton Rouge, Louisiana 70825, and Mr. Robert G. Pugh, Pugh, Pugh & Pugh, Commercial National Tower, 333 Texas Street, Suite 2100, Shreveport, Louisiana 71101-5302, counsel for the petitioner, and to Mr. Dennis Meaker, General Counsel, NASCO, Inc., 27 North Main Street, Springfield, TN 37172.

I further certify that all parties required to be served have been served.

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